WYNN RESORTS (MACAU) SA v. POH YANG HONG

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[SUIT NO: WA-22NCC-507-12-2017]
23 JULY 2018

CIVIL PROCEDURE: *Pleadings – Reply – Application for leave to file proposed rejoinder to plaintiff's statement of reply – Application under O. 18 r. 14 of Rules of Court 2012 ('ROC') – Whether application fortified position of plaintiff – Whether application should have been premised on O. 18 r. 4 of ROC – Whether application flawed – Whether proposed rejoinder provided substantive response to pleadings in statement of reply – Whether bare denials – Whether proposed joinder contained any pleadings that fulfilled requirements of O. 18 r. 8(1) of ROC – Whether defendant established case for leave to be granted*

CIVIL PROCEDURE: *Pleadings – Reply – Application to expunge paragraphs in plaintiff's statement of reply – Whether plaintiff merely responding to defences raised in statement of defence – Whether plaintiff pleaded necessary facts to demonstrate defendant's defence was not maintainable – Whether paragraphs sought to be expunged were legitimate pleadings – Whether tantamount to allegation of fact, new ground, or claim inconsistent with plaintiff's previous pleadings – Rules of Court 2012, O. 18 rr. 8, 10 & 19*

The plaintiff operates a casino resort and hotels in the Macau special administrative region of China which the defendant attended, at the material time. Upon the defendant's request, a credit facility had been granted to the defendant by the plaintiff in Macau, as permitted by the laws of Macau. However, the defendant failed to make repayment of the facility which led to the instant writ action by the plaintiff for the recovery of the credit facility. In his defence, the defendant pleaded that the credit extended by the plaintiff was used for the purpose of gambling at the plaintiff's casino which was contrary with the provisions of s. 26 of the Civil Law Act 1956 ('CLA') as well as s. 31 of the Contracts Act 1950 ('CA'), rendering the credit granted by the plaintiff to be unenforceable and thus irrecoverable in Malaysia. The plaintiff, in reply to the defence, asserted that s. 26 of the CLA and s. 31 of the CA are procedural provisions and argued that equity may be used to deprive a litigant of the benefit of a procedural provision as 'equity will not permit statute to be used as an engine of fraud' in the sense of being an unmeritorious and unconscionable conduct. The plaintiff submitted that this was a case where the defendant, a Malaysian, had, as a long-standing regular patron of the plaintiff's casino with an impressive history influenced the unsuspecting plaintiff, being a non-Malaysian entity to extend the defendant the credit facility, who repaid part of it, but defaulted in the repayment of the rest and thereafter conveniently introduced arguments on Malaysian legal provisions and public policy to justify non-recoverability of the facility. The

A defendant applied for leave to file a rejoinder to the plaintiff's statement of reply under O. 18 r. 14 of the Rules of Court 2012 ('ROC'). The defendant had earlier applied to expunge paras. 4.6 and 4.10 of the statement of reply.

Held (dismissing encl. 23):

B **(1)** The defendant's application to expunge paras. 4.6 and 4.10 of the statement of reply was dismissed. The reason relied on by the plaintiff to justify its pleadings in the statement of reply was to make the important assertion that the defendant was guilty of unconscionable and unmeritorious conduct. The plaintiff pleaded the necessary facts pursuant to O. 18 r. 8(1) of the ROC to demonstrate that the defence of C the defendant was not maintainable. The plaintiff was merely responding to the defences raised by the defendant in the statement of defence. Paragraphs 4.6 and 4.10 of the statement of reply appeared to be legitimate pleadings which were necessary to establish that the defences relied on by the defendant *vis-à-vis* s. 26 of the CLA and s. 31 D of the CA were not maintainable. (paras 12-16)

(2) There was nothing in paras. 4.6 and 4.10 of the statement of reply which could be said to tantamount to an allegation of fact, a new ground, or a claim which could be argued to be in any discernible fashion E inconsistent with the plaintiff's previous pleadings in the statement of claim, which continued to be clearly premised on an action for breach of contract. Further, the reliance on O. 18 r. 10 of the ROC to achieve what ought to have been more correctly done under O.18 r. 19 was wholly misconceived. The court's inherent powers to expunge the said paragraphs too was similarly flawed, for the court's inherent F powers do not confer or constitute a source of jurisdiction. The argument by the defendant that he had been denied the opportunity to respond to the paras. 4.6 and 4.10 was also entirely untenable. (paras 18-26)

G **(3)** The defendant's application for leave to file a rejoinder was grounded on O. 18 r. 14 of the ROC, which provides that, at the close of the pleadings, there is an implied joinder of issue on the pleading last served. This fortified the position of the plaintiff. Order 18 r. 14 also sets out the rule that a joinder of issue operates as a denial of every material allegation of fact made in a pleading on which there is an implied or H express joinder of issue. Again, this supported the position of the plaintiff. The application ought to have been premised on O. 18 r. 4 of the ROC. In the absence of any explanation by the defendant for the error, the application could not be sustained. (paras 31-34)

I **(4)** The proposed rejoinder did not truly provide any substantive response to the pleadings in the statement of reply that the defendant was strongly opposing. Other than simple denials, requiring the plaintiff to prove its allegations, saying the pleadings to be irrelevant, prejudicial and an

abuse of process, the defendant did not provide any real reply to the allegations in paras. 4.6 and 4.10 that he had always said he wanted to respond to. There was absolutely no attempt whatsoever to state why the allegations made by the plaintiff in the statement of reply were untrue or false. There was no logic behind the defendant's insistence on asking for a rejoinder (or to expunge the reply pleadings) if what he proffered in the proposed rejoinder were bare denials. (paras 37 & 39)

(5) There was no risk of the pleadings in the statement to be deemed admitted by the defendant merely because there was no rejoinder to the reply. The failure to contradict should not be treated as an admission. A basis that could be invoked to justify leave for rejoinder is the provision of O. 18 r. 8(1) of the ROC which requires matters which must be specifically pleaded subsequent to a statement of claim. However, it was clear that the proposed joinder did not contain any pleadings that could be said to fulfil the requirements of O. 18 r. 8(1) and neither did the defendant assert that he relied on O. 18 r. 8 to justify leave for the filing of the proposed rejoinder. (paras 42-45)

(6) All the grounds put forth by the defendant in support of his encl. 23 were repeated from his earlier unsuccessful attempt to expunge the two paragraphs in the statement of reply of the plaintiff. The substance of the applications herein was the same as the previous attempt to expunge the two paragraphs. Hence, the present application was fatally impaired by reason of *res judicata*. (paras 49 & 50)

(7) The defendant could have, in the first application, asked for leave to file a rejoinder under the clear provision of O. 18 r. 4. The defendant could have asked for an oral amendment of its earlier application and have it converted into one accurately grounded under O. 18 r. 4 or at least to have an alternative prayer included to justify leave. But he did not. The course of action employed by the defendant did little to advance the fair just and economical disposal of cases, if not tantamount to a borderline abuse of process. The defendant had also effectively presented its case against the reply pleaded by the plaintiff in instalment. That was an approach that must not be countenanced. The defendant had not been able to establish his case for leave to be granted to file the proposed rejoinder. (paras 54-57 & 60)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2016] 10 CLJ 247 HC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Bruce v. Odhams Press Ltd [1936] 1 KB 697 ***(refd)***

Chua Gek Kuon v. Seow Chai Seng [1991] 1 SLR(R) 614 ***(refd)***

ESP Synergy Sdn Bhd v. KB Enviro Sdn Bhd [2017] 1 LNS 2073 HC ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Harry v. Davey [1876] 2 ChD 721 ***(refd)***
Henderson v. Henderson (1843) 3 Hare 100 ***(refd)***
Herbert v. Vaughan [1972] 1 WLR 1128 ***(refd)***
International Shipcare Sdn Bhd v. The Owner Of And Other Persons Interested In The Ships Or Vessels MV "El Hadjar" Registered At The Port Of Annaba, Algeria; MV "Ain Temouchent", MV "Nememcha" And MV "Nedroma" Which Are All Registered At The Port Of Algiers, Algeria [2014] 1 LNS 879 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Norris v. Beazley (1877) 2 CPD 80 ***(refd)***
Panflex Sdn Bhd v. Amalan Tepat Sdn Bhd [2012] 2 CLJ 687 FC ***(refd)***
SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors [1975] 1 LNS 155 HC ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd) v. Tan Hong Woon [2001] 2 SLR (R) 36 ***(refd)***
Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***
Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2011] 9 CLJ 873 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 26
Contracts Act 1950, s. 31
Rules of Court 2012, O. 18 rr. 4, 7, 8(1), 10, 12(1)(a), 14(2)(a), (4), 19

For the plaintiff - Richard WG Lee & Shiyamala Devi Manokaran; M/s Jeff Leong, Poon & Wong
For the defendant - Dahrick Sivam Balakrishnan; M/s Albar & Partners

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is an application by the defendant for leave to file a rejoinder to the plaintiff's statement of reply under O. 18 r. 14 of the Rules of Court 2012. At the conclusion of the hearing, I refused leave and highlighted the broad reasons for my decision. This judgment contains the full grounds for the decision.

Key Background Facts

The Parties

[2] The plaintiff operates a casino resort and hotels in the Macau special administrative region of China. The defendant attended the casino resort of the plaintiff at the material time.

The Transaction

[3] It is contended by the plaintiff that then, upon the defendant's request, a credit facility had been granted to the defendant by the plaintiff in Macau as permitted by the laws of Macau.

The Suit

[4] Given the failure of the defendant to make repayment of the facility, the plaintiff commenced the instant writ action against the defendant to recover the credit facility.

[5] It is a key defence of the defendant's response, as pleaded in his statement of defence, that the credit extended by the plaintiff was used for the purpose of gambling at the plaintiff's casino. This in turn, according to the defendant would be contrary with the provisions of s. 26 of the Civil Law Act 1956 as well as of s. 31 of the Contracts Act 1950, rendering the credit granted by the plaintiff to be unenforceable and thus irrecoverable in Malaysia.

The Reply Intended To Be Impugned

[6] In its reply to the defence, the plaintiff sought to address the argument of the defendant relying on the alleged unenforceability of the credit facility by asserting that s. 26 of the Civil Law Act 1956 and s. 31 of the Contracts Act 1950 are procedural provisions (see *Star City Pty Ltd (formerly known as Sydney Harbour Casino Pty Ltd) v. Tan Hong Woon* [2001] 2 SLR (R) 36).

[7] In essence, the plaintiff argued that equity may be used to deprive a litigant of the benefit of a procedural provision as "equity will not permit statute to be used as an engine of fraud", in the sense of being an unmeritorious and unconscionable conduct (constructive or equitable fraud).

[8] The cases such as in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; [1995] 3 MLJ 141 and *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651 are asserted to be in support of this principle. If this argument of the plaintiff is successful, the defendant would thus be precluded from relying on his principal defences under s. 26 of the Civil Law Act 1956 and s. 31 of the Contracts Act 1950.

[9] Specifically, in paras. 4.6, 4.9, 4.10, 4.11 and 4.12 of the statement of reply, the plaintiff pleaded as follows:

> 4.6 The defendant has since 1999 been an active patron and/or gambler at many renowned and/or international casino *viz*:
>
> (1) Westgate Resorts (United States of America [the defendant's account was set up there on 19.2.1999]);
>
> (2) Crown Casino (Melbourne, Victoria, Australia [the defendant's account was set up there on 16.5.2002]);

A (3) Bellagio (Las Vegas, Nevada, United States of America [the defendant's account was set up there on 12.12.2006]);

(4) Wynn Las Vegas/Encore Las Vegas (Las Vegas, Nevada, United States of America [the defendant's account was set up there on 24.12.2006]);

B (5) Casino De Genting (Genting Highlands, Pahang, Malaysia [the defendant's account was set up there on 7.7.2007]);

(6) The Venetian Macao (Macau [the defendant's account was set up there on 10.12.1998]);

C (7) City of Dreams (Macau [the defendant's account was set up there on 20.6.2009])

…

(17) Crockfords Casino (London, United Kingdom [the defendant's account was set up on 26.8.2015]);

D (18) Aspinall's (London, United Kingdom [the defendant's account was set up there on 2.11.2015]).

4.9 The defendant's record of playing at numerous renowned/international casinos and of repaying substantial credit facilities extended to him by the plaintiff prior to the Loan had led, influenced and/or E encouraged the plaintiff to provide the Loan to him.

4.10 The defendant is a dishonourable debtor, trying to squirm his way out of his liability and obligation to repay the Loan to the Plaintiff, after having acknowledged and wholly enjoyed the full benefit of the Loan in Macau, requested by the defendant in Macau and granted by the plaintiff F in Macau as permitted by and under the law in and of Macau.

4.11 This is a case where the defendant, a Malaysian, had as a long-standing regular patron of the plaintiff with an impressive history/record asked and influenced the unknowing and unsuspecting plaintiff (a non-Malaysian entity) to give the defendant certain credit facilities i.e. the Loan, repaid part of it, defaulted in the repayment of the rest and G subsequently pulled out of his sleeve arguments on allegedly Malaysian legal strictures and public policy to one-up on the plaintiff when the suit herein for the repayment of the balance due under the Loan was initiated against the defendant.

4.12 The defendant's unmeritorious and unconscionable conduct as H aforesaid ought not to be countenanced by the court in the interest of justice and equity.

[10] Thus, the plaintiff submitted that as above-stated in para. 4.11 in the statement of reply, this is a case where the defendant, a Malaysian, had as a long-standing regular patron of the plaintiff's casino with an impressive I history, influenced the unsuspecting plaintiff, being a non-Malaysian entity

to extend the defendant the credit facility, who repaid part of it, but defaulted in the repayment of the rest and thereafter conveniently introduced arguments on Malaysian legal provisions and public policy to justify non-recoverability of the facility.

Dismissal Of An Earlier Application To Expunge

[11] I had dismissed the defendant's application to expunge paras. 4.6 and 4.10 of the statement of reply. I attributed the refusal to a number of reasons.

[12] First, as I mentioned, the reason the plaintiff relied on to justify its pleadings in the statement of reply was to make the important assertion that the defendant is guilty of unconscionable and unmeritorious conduct. This, in my view would be in accord with the requirements of O. 18 r. 8(1) of the Rules of Court 2012 ("the RC") which read as follows:

> 8. Matters which shall be specifically pleaded (O. 18 r. 8)
>
> (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; and
>
> (c) which raises issues of fact not arising out of the preceding pleading.

[13] As such, what the plaintiff intended to achieve in the statement of reply was to plead the necessary facts pursuant to O. 18 r. 8(1) to demonstrate that the defence of the opposing party, the defendant herein, is not maintainable (see *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615).

[14] I accept the defendant's contention that in the case of *International Shipcare Sdn Bhd v. The Owner Of And Other Persons Interested In The Ships Or Vessels M.V. "El Hadjar" Registered At The Port Of Annaba, Algeria; M.V. "Ain Temouchent", M.V. "Nememcha" And M.V. "Nedroma" Which Are All Registered At The Port Of Algiers, Algeria* [2014] 1 LNS 879; [2015] 7 MLJ 753, which followed the English decision in *Herbert v. Vaughan* [1972] 1 WLR 1128 it was held that it is trite law that in the statement of reply, a plaintiff cannot plead a new cause of action or raise any new ground or a claim inconsistent with the statement of claim. And that in the event the defence provides reasons for setting up a new cause of action, the correct step to be taken which is in accord with O. 18 r. 10 of the RC 2012 is instead to amend the statement of claim, and not to deliver a reply.

[15] But that was not the situation in the present case before me. The plaintiff was merely responding to the defences raised by the defendant in the statement of defence. There was no new cause of action introduced by the defendant.

[16] I did not consider it difficult to agree that paras. 4.6 and 4.10 in the statement of reply appear to be legitimate pleadings which are necessary to establish that the defences relied on by the defendant *vis-à-vis* s. 26 of the Civil Law Act 1956 and s. 31 of the Contracts Act 1950 are not maintainable, as well as they relate to the issues raised in the statement of defence, and in any event were relevant to the case.

[17] Secondly, the application to expunge instituted by the defendant was said to be grounded on O. 18 r. 10, primarily the rule that "a party shall not in any pleading make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading of his". It reads thus:

> 10 Departure (O. 18 r. 10)
>
> (1) A party shall not in any pleading make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading of his.
>
> (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

[18] However, there was nothing in paras. 4.6 and 4.10 which could be said to tantamount to an allegation of fact, a new ground, or a claim which could be argued to be in any discernible fashion inconsistent with the plaintiff's previous pleadings in the statement of claim, which continued to be clearly premised on an action for breach of contract.

[19] Further, the new pleadings in the statement of reply, paras. 4.6 and 4.10 in particular are material facts. It is trite that under O. 18 r. 7 of the RC 2012, material facts must be pleaded, for these are the material factors which are necessary for the purpose of formulating a complete cause of action. In *Bruce v. Odhams Press Ltd* [1936] 1 KB 697, Scott LJ said:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any one 'material' fact is omitted, the statement of claim is bad.

[20] It is after all trite that a party is entitled to have from the opposing party, particulars of facts, as opposed to evidence, relevant to the issues at stake in order to prevent surprise, in order to enable the other party to know the exact case he has to meet, especially since parties cannot at trial adduce evidence in support of facts which were not pleaded facts (see the Supreme Court decision in *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185).

[21] Further, O. 18 r. 12(1)(a) of the RC 2012 also provides that:

> Particulars of pleading (O. 18 r. 12)
>
> 12(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> ...

[22] Thirdly, I had also dismissed the application to expunge by reason of the uncertain basis of the same. As mentioned earlier, the application to expunge was premised on O. 18 r. 10. It was not instituted on the basis of the usual provisions of striking out of pleadings embodied in O. 18 r. 19.

[23] Reliance on O. 18 r. 10 to achieve what ought to have been more correctly done under O. 18 r. 19 was therefore wholly misconceived. Order 18 r. 10 does not provide for pleadings or any parts thereof to be struck out. And after all, a statement of reply is plainly a form of pleading (see *ESP Synergy Sdn Bhd v. KB Enviro Sdn Bhd* [2017] 1 LNS 2073; [2018] 8 MLJ 516). There is no basis for a pleading such as paras. 4.6 and 4.10 of the statement of reply to be expunged unlike an affidavit or evidence given on oath.

[24] The defendant's other argument on the court's inherent powers to expunge the said paragraphs too is similarly flawed, for the court's inherent powers do not confer or constitute a source of jurisdiction (see the Federal Court decision in *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2012] 2 CLJ 687; [2012] 2 MLJ 168).

[25] Fourthly, I refused the application because it was also erroneously argued by the defendant that he had been denied the opportunity to respond to the said paras. 4.6 and 4.10 of the statement of reply. The defendant maintained that the matters raised in the reply pleadings were serious and fresh allegations directed against the defendant, questioning his integrity, which justified the position that the defendant must be afforded an opportunity to refute the same.

[26] This was entirely untenable because pursuant to O. 18 r. 14(2) and (4) of the RC 2012, there is at the close of pleadings an implied joinder of issue on the statement of reply, being the pleading last served. A joinder of issue operates as a denial of every material allegation of fact made in the reply (see *Chua Gek Kuon v. Seow Chai Seng* [1991] 1 SLR(R) 614 at 620).

[27] Not only that. The defendant in fact had the option of invoking O. 18 r. 4 of the RC 2012 to make a response to the statement of reply, by filing a further pleading provided however that leave of court was obtained. The defendant chose not to pursue this; much to its own detriment.

A **The Present Application To File Rejoinder**

[28] Following the refusal of the application to expunge, the defendant continued to pursue the matter by filing the instant application which seeks leave to file a rejoinder to the statement of reply of the plaintiff. This was documented in encl. 23 and stated to be premised on O. 18 r. 14 of the RC 2012 and the court's inherent jurisdiction.

B

[29] Having heard oral submissions by counsel for both litigants, I dismissed the application. The reasons for the refusal, and the relevant arguments posited by counsel on the application are examined in the following paragraphs.

C

Incorrect Basis

[30] The defendant grounded this application for leave to file a rejoinder on O. 18 r. 14 of the RC 2012. This provision reads:

D

14. Denial by joinder of issue (O. 18 r. 14)

(1) If there is no reply to a defence, there is an implied joinder of issue on that defence.

(2) Subject to paragraph (3):

E

(a) there is at the close of pleadings an implied joinder of issue on the pleading last served; and

(b) a party may in his pleading expressly join issue on the next preceding pleading.

(3) There can be no joinder of issue, implied or express, on a statement of claim or counterclaim.

F

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is an implied or express joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

G

[31] I struggle to appreciate the basis of the defendant's reliance on O. 18 r. 14 to support his application. Order 18 r. 14 as set out above clearly provides that at the close of pleadings, there is an implied joinder of issue on the pleading last served. This fortifies the position of the plaintiff. Order 18 r. 14(4) also sets out the rule that a joinder of issue operates as a denial of every material allegation of fact made in a pleading on which there is an implied or express joinder of issue.

H

[32] Again this supports the position of the plaintiff, as indeed it was a ground for my dismissing the earlier application by the defendant to expunge. At the hearing, counsel for the defendant gave no explanation on this question.

I

[33] As I stated earlier in my refusal of the expunge application, the defendant could have also asked for leave to file a joinder under O. 18 r. 4. This provision quite straightforwardly states thus:

> 4 Pleadings subsequent to reply (O. 18 r. 4)
>
> Pleadings subsequent to a reply or a defence to a counterclaim shall not be served except with the leave of the court.

[34] Surely O. 18 r. 4 ought to have been the correct basis to premise the application now before me. On this ground alone, in the absence of an explanation by the defendant at the hearing, which makes the error, if indeed it was one, of a more fundamental one, to justify reference to O. 18 r. 4 instead, what more a satisfactory one, the instant application cannot be sustained and must be refused.

The Proposed Rejoinder Unnecessary

[35] The defendant argued at the hearing that the application was necessary to afford the defendant the opportunity to answer to the statement of reply, particularly paras. 4.6 and 4.10 therein which pleaded that the defendant was a "dishonourable debtor". For that purpose, the defendant had also furnished the proposed rejoinder, as exhibited to the affidavit of the defendant affirmed on 3 May 2018 ("the proposed rejoinder").

[36] The proposed rejoinder is not very long. It would be remiss of me not to set it out in its entirety, for better appreciation of the issues, hereunder:

(i) The defendant joins issue with the plaintiff on the matters raised in para. 4.6 of the plaintiff's reply dated 5 February 2018 ("the plaintiff's reply), and puts the plaintiff to strict proof thereof.

(ii) Further and/or in the alternative, the defendant says that the matters as set out in para. 4.6 of the plaintiff's reply are factually incorrect or not true in some material respects.

(iii) Further and/or in the further alternative, the defendant says that the matters as set out in para. 4.6, even if they be factually correct (and which the defendant says they are not), are absolutely of no relevance to the plaintiff's claim as against the defendant in the matter herein and in consequence must be totally disregarded by this Honourable Court.

(iv) Further and/or in the further, further alternative, the defendant says that the matters as stated in para. 4.6 of the plaintiff's reply have absolutely no casual connection with the plaintiff's alleged claim as against the defendant, as per the plaintiff's statement of claim filed in the matter herein.

(v) The defendant very vehemently refutes the unfounded allegation in para. 4.10 of the plaintiff's reply that the defendant is a "dishonourable debtor", and puts the plaintiff to strict proof of the said allegation.

(vi) The defendant further says that the very serious allegation in para. 4.10 of the plaintiff's reply that the defendant is a "dishonourable debtor" is conduct on the part of the plaintiff that is mischievous and deliberately intended to embarrass the defendant and prejudice this Honourable Court.

(vii) Further and/or in the alternative, the defendant takes very strong exception to the reference in para. 4.10 of the plaintiff's reply that the defendant is a "dishonourable debtor", as being a very serious allegation, touching upon and concerning the personal reputation and integrity of the defendant.

(viii) Further and/or in the further alternative, the defendant says that given the fact that a judicial determination by this Honourable Court on the plaintiff's claim is still pending, the allegation that the defendant is a "dishonourable debtor" is conduct on the part of the plaintiff constituting a pre-judging of the fundamental issue in the matter herein and which is on whether the defendant can, in fact and in law, be classified a debtor of the plaintiff in the claim herein under the laws of Malaysia.

(ix) Further and/or in the further, further alternative, the defendant says that the allegation in the plaintiff's reply that the defendant is a "dishonourable debtor" in the face of the pending proceedings before this Honourable Court, and premised on the plaintiff's statement of claim, is conduct on the part of the plaintiff constituting an usurpation of the powers of this Honourable Court, and is therefore scandalous, frivolous and vexatious, and an abuse of the process of this Honourable Court.

[37] Even a cursory review of the proposed rejoinder will readily lead one to the conclusion that it does not truly provide any substantive response to the pleadings in the statement of reply that the defendant is strongly opposing.

[38] Thus, para. 1 of the proposed rejoinder merely puts the plaintiff to strict proof in respect of para. 4.6; para. 2 says that para. 4.6 is not true; para. 3 avers that para. 4.6 is not relevant to the plaintiff's claim; para. 4 pleads that para. 4.6 has no causal connection with the claim; para. 5 merely refutes the allegation of "dishonourable debtor"; para. 6 states para. 4.10 is intended to embarrass the defendant; para. 7 reiterated the strong exception taken by the defendant to the reference of "dishonourable debtor"; para. 8 states that such a reference constituted a pre-judging of the issue which has yet to be

determined by this court; and in para. 9 concluded by pleading that attribution of the reference of "dishonourable debtor" to the defendant is an abuse of the process of the court.

[39] Other than simple denials, requiring the plaintiff to prove its allegations, saying the pleadings to be irrelevant, prejudicial and an abuse of process, the defendant did not provide any real reply to the allegations in paras. 4.6 and 4.10 that he had always said he wanted to respond to. There was absolutely no attempt whatsoever to state why the allegations made by the plaintiff in the statement of reply were untrue or false.

[40] Further, the proposed rejoinder suffers from another infirmity. It made mention of the plaintiff to be put on strict proof and the paras. 4.6 and 4.10 to be irrelevant, among others. But it is both superfluous and entirely unnecessary for the defendant to have provided the kind of pleadings as proposed to be in the proposed rejoinder.

[41] For it certainly goes without saying that the burden is on the plaintiff to prove its case and the allegations it had included in its pleadings. Similarly, whether the matters pleaded by the plaintiff are relevant to its claim is a burden for the plaintiff to discharge, by adducing admissible evidence at trial. Even without the defendant pleading that the plaintiff is put to strict proof, it cannot conceivably be denied that the plaintiff must establish its case and prove its assertions.

[42] I cannot see the logic behind the defendant's insistence on asking for a rejoinder (or to expunge the reply pleadings, earlier) if what he now proffers in the proposed rejoinder are for all intents and purposes, bare denials.

[43] After all, there is no risk of the pleadings in the statement to be deemed admitted by the defendant merely because there is no rejoinder to the reply. The failure to contradict should not be treated as an admission under the established principle stated in the leading case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 because that case concerned unreplied averments in affidavits, not statements in pleadings. More importantly, under pleading rules it is plain from O. 18 r. 14(2)(a) as mentioned earlier, that there is already an implied joinder of issue in the last pleading.

[44] A basis that could be invoked to justify leave for rejoinder is the provision of the above-mentioned O. 18 r. 8(1) of the RC 2012 (which earlier was relied on by the plaintiff to justify the matters pleaded in its statement of reply) which requires matters which must be specifically pleaded subsequent to a statement of claim for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality in circumstances set out earlier in this judgment.

[45] But again, it is clear that the proposed joinder does not contain any pleadings that could be said to fulfil the requirements of O. 18 r. 8(1). No less significantly, neither did the defendant assert that he rely on O. 18 r. 8 to justify leave for the filing of the proposed rejoinder.

Leave Cannot Be Justified

[46] It is plain that O. 18 r. 4 is designed to ensure the close of pleadings, and avoid the pre-trial process going on indefinitely. And there are authorities which held that leave to serve a rejoinder or subsequent pleadings will not be granted unless it is required for matters which must be specifically pleaded in adherence to O. 18 r. 8, as stated earlier (see *Harry v. Davey* [1876] 2 ChD 721 and *Norris v. Beazley* (1877) 2 CPD 80). It has been stated earlier that this is not the case in the instant application before me.

[47] The application for leave for the filing of the rejoinder is therefore untenable. Assuming the defendant had intended to rely on O. 18 r. 4 to seek leave of court instead of O. 18 r. 14 as documented in its encl. 23, there is no legitimate basis for leave to be granted. The burden is on the plaintiff to establish its case and prove the matters it had pleaded. Even the proposed rejoinder exposed the absence of any substantive reply by the defendant to paras. 4.6 and 4.10 in the statement of reply.

[48] This stark inconsistency between what the defendant had proposed to plead in reply and the strong objection the defendant had against the inclusion of paras. 4.6 and 4.10 in the statement of reply is difficult to fathom, other than, possibly, representing efforts on the part of the defendant towards delaying the proceedings.

Res Judicata And Other Considerations

[49] I cannot but further agree with the plaintiff that the application herein is incompetent by reason of *res judicata*. All the grounds put forth by the defendant in support of his encl. 23 are repeated from his earlier unsuccessful attempt to expunge the two paragraphs in the statement of reply of the plaintiff. The substance of this application is the same as the previous attempt to expunge the two paragraphs. The defendant wants to have the paragraphs either removed or replied to.

[50] The inescapable and irresistible conclusion in this instant case must also be that the present application is fatally impaired by reason of *res judicata*. It cannot be allowed to succeed in view of issue estoppel (see the Court of Appeal decision in *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2011] 9 CLJ 873). The specific issues in contention had been adjudicated on, and that too by instalments. Issue estoppel applies to resolutely prevent yet another round of litigation of the same issues. This court cannot countenance this wholly unnecessary endeavour.

[51] The Supreme Court made it clear in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 that there are two kinds of estoppel *per rem judicatum*, namely cause of action estoppel and issue estoppel. The scope of the plea of *res judicata* was clarified in the following terms:

> [1] The significance of *res judicata* lies in its effect of creating an estoppel *per rem judicatum*, which may take the form of either cause of action estoppel or issue estoppel. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in Court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.
>
> [2] The doctrine of *res judicata* is not confined to causes of action or issues which the court is actually asked to decide or has already decided. *It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them*. (emphasis added)

[52] The Supreme Court referred to and applied the following common law principles in its exposition of the scope of the doctrine of *res judicata*. First, the passage by Wigram VC in the case of *Henderson v. Henderson* (1843) 3 Hare 100 at p. 115 which reads:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the same subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[53] In addition, the meaning of the words in the said above statement, namely "every point which properly belonged to the subject of litigation" was explained by Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p. 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[54] The defendant could have in the first application asked for leave to file a rejoinder under the clear provision of O. 18 r. 4 instead or premising his application on doubtful basis. The defendant could have even asked for an oral amendment of its earlier application and have it converted into one accurately grounded under O. 18 r. 4, or at least to have an alternative prayer included to justify leave. But he did not. Only now the defendant seeks to invoke O. 18 r. 4.

[55] And in *SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors* [1975] 1 LNS 155; [1977] 2 MLJ 220, the High court observed:

> Parties in civil suits should observe the rules of procedure with meticulous care because a failure to do so may well result in irreparable set-backs for them and it is not often that a court will take it upon itself to free the parties from difficulties of their own making and put them on their feet again.

[56] This observation in my view, continue to hold true post the coming into force of the RC 2012. The course of action employed by the defendant does little to advance the fair just and economical disposal of cases, if not tantamount to a borderline abuse of process. It does not promote an efficient administration of justice at all.

[57] The defendant has also effectively presented its case against the reply pleaded by the plaintiff in instalments. That is an approach that must not be countenanced. In *Tenaga Nasional Bhd v. Prorak Sdn Bhd* [2000] 1 CLJ 553; [2000] 1 MLJ 479 where in the latter, Gopal Sri Ram JCA (as he then was) held:

> Applying the foregoing principles to the facts of the present case, it was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular for the reasons we have set out earlier in this judgment. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would, as Haidar JCA observed during the course of En Zainur's argument, amount to presenting one's case in instalments. That is something the law does not permit.

[58] As such, the defendant should rightfully be prevented from now applying for leave. He should be estopped from taking this contrary position now (see the leading Federal Court decision in *Boustead Trading (1985) Sdn Bhd. v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283). It would be inequitable to the plaintiff if it were otherwise.

[59] Other than *res judicata*, his shifting position reeks of the less than favourable conduct of approbating and reprobating. The defendant cannot simply blow hot and cold. In the case of *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as His Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

Conclusion

[60] In view of the foregoing reasons, in my judgment, the defendant has not been able to establish his case for leave be granted to file the proposed rejoinder. Accordingly, I dismiss encl. 23, with cost.